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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	86430565
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Serial No: 86430565  
Mark: ALMA SANA  
Applicant: Lauren Braun  
Examining Attorney: Mary W. Kay H. Price, Esq.  
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**ALMA SANA'S EX PARTE APPEAL BRIEF**

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## **I. Introduction**

Alma Sana Inc. is a not-for-profit organization which was founded by Lauren Braun (“Applicant”) “to increase rates of full and timely immunization through mothers’ use of a simple reminder bracelet, to be worn by her child from birth to age four.” (May 3, 2016 Specimen, TSDR at p. 21.) The bracelet helps poorly-educated, often illiterate mothers in impoverished countries to remember when to get their children vaccinated by utilizing the bracelets as mnemonic devices. (*Id.* at p. 22.) Each bracelet includes specific shapes which are “punched out” to mark that a vaccine has been administered, along with numbers that indicate when a return visit is necessary. (*Id.* at p. 14-15.)

This concept arose out of Applicant’s work at a health care clinic in Cusco, Peru in 2009 while she was a student at Cornell University. (*Id.* at p. 19.) Alma Sana’s initial funding to conduct pilot studies and begin operations came from a grant through the Bill & Melinda Gates Foundation. (*Id.* at p. 13, 42.) At the time of Alma Sana’s trademark application, it had provided over 100 bracelets to mothers in Peru and Ecuador in conjunction with its pilot studies. (*Id.* at p. 41–42.)

## **II. Description of the Record**

On October 21, 2014, Applicant filed its trademark application for Classes 005 (pharmaceutical goods), 014 (jewelry), 041 (education), and 044 (medical services). The application was initially refused on February 20, 2015 for all four classes. The initial refusal included a request for a more definite identification of the goods and services, as well as a finding that the specimen failed to show the

applied-for-mark in use in commerce in connection with the goods and services. On August 14, 2015, Applicant filed its Response to Office Action which included more detailed descriptions of the goods and services and included a substitute specimen.

On November 4, 2015, the examining attorney found the amended identification of services for Class 041 acceptable, but required amendment of the identification of goods in Classes 005 and 014, and made final her refusal of the identification of services in Class 044. The November 4, 2015 refusal also made final her earlier finding that the specimen failed to show the applied-for-mark in use in commerce in connection with the goods and services.

On May 3, 2016, Applicant initiated an appeal and also filed a Request for Consideration. With the Request for Reconsideration, Applicant submitted a substitute specimen which included, among other things, an instruction sheet for the use of the wristbands and a photograph of Applicant using the sheet to explain the wristbands to a nurse in Peru. (May 3, 2016 Specimen, TSDR at p. 2, 3.)

On June 6, 2016, the examining attorney denied the Request for Reconsideration. The examining attorney found that the following requirements had been satisfied:

- 1) Amended identification of goods in Class 005;
- 2) Amended identification of goods in Class 014; \*\*however, the word “provides” should be changed to “provide,” for proper sentence structure/grammar;<sup>1</sup>
- 3) Amended identification of services in Class 044;
- 4) Substitute specimen for Class 041; and
- 5) Substitute specimen for Class 044.

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<sup>1</sup> Applicant accepts this change and will make this revision at the conclusion of these proceedings.

(June 6, 2016 Reconsideration Letter, TSDR.) In other words, the examining attorney found that the requirements with respect to Classes 041 and 044 had been satisfied. However, the examining attorney concluded that the following issues were “maintained and continue to be final: Specimens for Class 005 and Class 014 do not show the mark with any of the goods specified in Classes 005 and 014.” (*Id.*)

The examining attorney explained the basis for her refusal of Classes 005 and 014 as follows:

The substitute specimens for Classes 005 and 014 do not show the mark on the goods or packaging for the goods. There is no display associated with the goods at their point of sale. There is no webpage with a means to order the goods. There is no “buy” button anywhere. The applicant’s goods, namely, the bracelets, seem to be the object of the applicant’s charitable foundation, not something the applicant actually sells. The applicant has not provided a way or a page for consumers to order/get the bracelets. With respect to what the applicant refers to as an instruction manual, it appears as though there is a website, not something packaged with goods.

(*Id.*) On August 12, 2016, Applicant filed a Request to Divide Application to allow Classes 041 and 044 to proceed to registration. Accordingly, this appeal is now limited to the refusal of Classes 005 and 014. The sole issue for adjudication in this appeal is whether the specimens submitted by Applicant with respect to these classes show “use in commerce” to establish trademark usage.

### **III. Argument**

Applicant has submitted an adequate specimen to demonstrate the mark’s “use in commerce” as that term is defined by Section 45 of the Trademark Act. A mark is deemed to be in use in commerce on goods when:

(A) It is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale, and

(B) The goods are sold or transported in commerce.

15 U.S.C. § 1127.

The Manual of Examining Procedure explicitly provides that an instruction manual may serve as an acceptable specimen to demonstrate use in commerce:

If printed matter included with the goods functions as a part of the goods, such as a manual that is part of a kit for assembling the product, then placement of the mark on that printed matter does show use on the goods. *In re Ultraflight Inc.*, 221 USPQ 903, 906 (TTAB 1984) ("We believe the instruction manual is as much a part of applicant's goods as are the various parts that are used to build the gliders. Application of the mark to the manual of assembly instructions, then, must be considered affixation to the goods.").

TMEP § 904.03(j). *Ultraflight* explained that "[w]here the 'insert' or 'instruction sheet' is, by any reasonable interpretation, part of the goods themselves, application of the mark to such an 'insert' or 'instruction sheet' is an application of the mark to the goods." 221 USPQ at 906. Numerous TTAB decisions since have reiterated that "an instruction manual may be 'as much a part of applicant's goods' as the goods themselves, and integral to their use, and therefore may be accepted as evidence of 'affixation to goods.'" *PrimeSense Ltd. v. Primesensor Tech. Inc.*, 2012 TTAB LEXIS 480 at \*22 (Dec. 13, 2012) (citing *Ultraflight*); *In re Seegrid Corporation*, 2009 TTAB LEXIS 636 at \*7 (Oct. 8, 2009) (finding the "user manual is sufficient to support an allegation of use").

The TTAB's decision in *In re Samick Music Corp.*, 2000 TTAB LEXIS 635 at \*6 (Sept. 20, 2000) is particularly instructive here. In *Samick*, the examining attorney rejected the application because the original specimens were merely advertising for the good, an electric piano. (*Id.* at \*1.) Following that refusal, the applicant submitted a substitute specimen which included a computer disk with the proposed mark on it. According to the applicant, "[C]opies of the demo disks [are] shipped with the Digiplayer pianos. . . . The demo disks demonstrate the operation of the pianos and are tantamount to an instruction manual." (*Id.* at \*4.) Accordingly, the applicant argued that the disks "are an integral part of the product being sold, as would be an instruction manual." (*Id.*) The TTAB agreed, finding:

From the information on the advertisement and applicant's explanation, it is clear that applicant's goods require software to operate; and that the software contained on the demo disk specimen is used to demonstrate the operation of the goods and is shipped with the goods. Clearly, these demo disks are an integral part of the goods themselves and, therefore, they constitute acceptable specimens of trademark use.

(*Id.* at \*6–7.) The same rationale applies here.

Applicant has submitted a one-page instruction sheet as a specimen. (May 3, 2016 Specimen, TSDR at p. 2.) This instruction sheet, which contains the Alma Sana mark in the upper-left hand corner, shows how the bracelets are intended for use. The instruction sheet is provided to mothers and nurses along with the bracelets, *i.e.*, they are shipped with and accompany the bracelets upon delivery to the end-user. (*Id.* at p. 1, 11.) Without the instruction sheet, the mothers and nurses using the Alma Sana bracelets would have no way of being able to decode



the various symbols on the bracelet. In other words, the instruction sheet is an integral part necessary to use the Alma Sana wristbands, just as the instruction manual for kit assembly in *Ultraflight* served as an integral part necessary to build the gliders. Accordingly, the instruction sheet is a “printed matter included with the goods [which] functions as a part of the goods.” *Ultraflight*, 221 USPQ at 906. This constitutes an acceptable specimen to show trademark use.

The examining attorney rejected the use of the instruction sheet as a specimen, reasoning that, “With respect to what the applicant refers to as an instruction manual, it appears as though there is a website, not something packaged with goods.” (June 6, 2016 Reconsideration Letter, TSDR.) This is wrong. The Alma Sana instruction sheet is not “a website.” Rather, the instruction sheet is a separate, standalone document which is provided to mothers and nurses in conjunction with the bracelets to explain their use. (May 3, 2016 Specimen, TSDR at p. 2.)

The context for this instruction sheet—that it accompanies the bracelets and is vital to their proper use—was documented for the examining attorney through a specimen from Alma Sana’s website, which provides:

A laminated information card which pictorially represents how the bracelet helps moms remember their children’s vaccination dates supplement the bracelet by decoding the symbols on the bracelets. The info card, along with the bracelet, helps moms visualize the process of how the bracelet reminds them of the upcoming vaccination appointments.

(*Id.* at p. 11; *see also* p. 1 (“Corresponding guides help nurses and mothers to decode symbols.”)) While an advertisement (such as a website) is not sufficient standing

alone to serve as an appropriate specimen, “information on the advertisement and [the] applicant’s explanation” can provide appropriate context to demonstrate an instruction manual’s use as an acceptable specimen. *Samick*. 2000 TTAB LEXIS 635 at \* 6. The “Specimen Description” in Applicant’s Request for Reconsideration explained the instruction sheet as follows:

Instructional manual (that contains the mark) provided to nurse and medical workers instructing the nurse on how to utilize the jewelry, including pictures providing explanation of how to use jewelry; Photograph showing medical worker utilizing instructional manual (that contains the mark) that has both the mark alma sana as well as a picture of the jewelry; Instructional manual (that contains the mark) for mothers of children utilizing bracelet that has instructions on how the bracelet is to be utilized, including pictures providing explanation of how to use jewelry.

(May 3, 2016 TEAS Request for Reconsideration After FOA, TSDR.)

To provide further context for the instruction sheet, Applicant also submitted a photograph of Applicant using the sheet to explain the bracelet’s functionality to a nurse in Peru. (May 3, 2016 Specimen, TSDR at p. 3.) This photograph makes it clear that the instruction sheet is a distinct document which accompanies the bracelets and explains their use. Again, the examining attorney’s contention that the instruction sheet is “a website, not something packaged with the goods” is factually inaccurate.

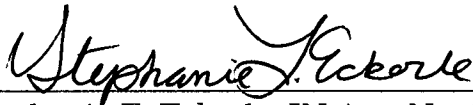
The instruction sheet accompanies the bracelets and is integral to their proper function. It is therefore acceptable as a specimen to show the Alma Sana mark in commerce.

#### IV. Conclusion

Applicant has submitted a specimen which shows its mark as used in commerce. The instruction sheet accompanies the bracelets and functions as a part of the good itself. Accordingly, the instruction sheet is an acceptable specimen to show the mark's use in commerce. All other requirements have been satisfied for publication. The trademark refusal for Classes 005 and 014 should therefore be reversed.

Respectfully submitted,

PLEWS SHADLEY RACHER & BRAUN LLP

A handwritten signature in black ink, reading "Stephanie T. Eckerle". The signature is written in a cursive style with a horizontal line underneath.

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